IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY

NOTICE OF MOTION NO. 108 OF 2005
IN
PETITION NO. 199 OF 2004

Ramavatar Kunjilal Gupta and anr. ... Jud. Debtor

Versus

SICOM Ltd. and anr. ... Jud.Creditor

Mr. Snehal Shah with Mr. N.C. Parikh i/by Mansukhlal & Co. for Insolvents.

Mr. Kishore Jain with Mr. P.V. Shah for Pet. Creditor.

Mr. A.P. Kothari, Dy. O.A. in person.

CORAM : F.I. REBELLO,J.
DATED : AUGUST 17, 2005

P.C.

. By the present motion, the insolvents have prayed that the exparte order dated 21.6.2005 be set aside.

2. A few facts may now be set out.

. The Judgement Debtors were Directors of M/s. Trimbak Ispat Pvt. Ltd. as also of Ms. Tigrania Ispat Pvt. Ltd. The Judgement Creditors had filed summary suit being Summary Suit No. 3646 of 1987 against the insolvents basing their claims on guarantees issued by the insolvents. A decree came to be passed on 30.6.1989. The Motion was taken

out for setting aside the decree on the ground that it was exparte. That motion came to be dismissed by order dated 12.7.1991. The execution application was lodged on 3.9.2002.

. On 25.2.2004, insolvency notice was served on the insolvents. The notice of motion was taken out for setting aside the said notice which was dismissed by order dated 23.12.2004. An appeal was preferred against the order dated 23.12.2004 which came to be dismissed on 29.3.2005. In the meantime, the Judgment creditors filed Insolvency petition bearing No. 199 of 2004 on 24.12.2004. It is the case of the insolvents that on 21.6.2005, the said petition came up for hearing without proper intimation to them and the reliefs in the petition were made absolute in their absence. It is based on this that the insolvents have filed present motion for setting aside the order dated 21.6.2005. In the impugned order, the various points which arose for consideration have been set out.

3. The learned counsel for the insolvents submits that the insolvents have made out sufficient cause for non appearance. It is further submitted that the test to be applied in such matters is whether

the insolvents were diligent in prosecuting the proceedings. It is pointed out that earlier, the insolvents had taken out motion for setting aside notice of insolvency. They preferred appeal and consequently it cannot be said that the insolvents were not taking steps to prosecute the proceedings. In the matter of service of notice, the learned counsel has relied on the judgment of the Division Bench of this court in the case of Sunder Spinner Vs. Makan Bhula reported in 1922 Bombay 377 (1) and the judgement in M.R. Ved & Co. Vs. S.B. Jayeem reported in AIR (30) 1943 Bombay 340.

. On the other hand on behalf of the Judgement Creditors, reply has been filed by Ms. Zenobia Kabadi, an Executive (Legal) opposing granting of relief. It is sought to be pointed out that notice was served through registered post after permission was obtained from this court. Notice by registered post, it is set out, is permissible considering Rule 63 of the Bombay Insolvency Rules, 1910. Rule 63 reads as under :

> "Where a debtor or any person upon whom the petition to be served is not within the limits of the Original Civil Jurisdiction of the Court, the Court may

order service to be made within such time and in such manner and form as it shall think fit."

. It is therefore, contended that the Judgement creditors followed the procedure in serving the summons on the insolvents by registered post. There is no denial by the insolvents that notice which was addressed at the address in Nashik was not their residential address. The service was officially done through post. The postal packets under Registered Post A.D. were returned back with the endorsement "not claimed". It is pointed out that even though the rejoinder has been filed on behalf of the insolvents, the insolvents nowhere have made a statement that they were not present at the address or were away from station when the postman intimated that a postal packet had been received addressed to the insolvents. In the absence of any explanation, it is submitted that it must be held that there is good service on the insolvents. Apart from that it is pointed out that the Judgement Creditors had served copy of the insolvency petition on the advocates for the insolvents much earlier. This has not been denied by the insolvents in the rejoinder filed by them. Reliance has been placed on the judgement of the

Apex Court in the case of State of Madhya Pradesh

Vs. Hiralal & Ors. JT 1996(1) S.C. 669.

4. It is in the background of these facts that the issue will have to be considered. Normally in such matters the court does extend its discretion in condoning the delay so as to enable the party who was diligently prosecuting the proceedings and if otherwise is able to make out sufficient cause to condone the delay. Also the earlier concept that merits of the matter prima facie will not be considered while considering the application for condonation of delay has now been given go bye. The Apex Court has now accepted the principle that even in the matters of condoning the delay, it is open to the court to consider prima facie, the merits of the matter to examine whether the delay if there be no merit ought to be condoned or not. It is on this basis that we shall examine the matter.

5. The insolvents have approached this court and have filed affidavit of Sanjay Gupta in support of this motion. In Paragraph 2 it is set out that on 21.6.2005, they received a telephonic message from the Advocate M/s. Mansukhlal Hiralal & Co. stating that they came to now that the above

insolvency Petition was posted on the board of Justice D.G. Karnik for hearing and final disposal and on that day an exparte order was passed making the petition absolute in terms of Prayer (a) of the petition. The advocate then enquired to the affiant whether the petition was served upon them. The advocates were informed that petition had not been served and hence, exparte order ought not to have been passed. Thereafter search was made of the papers and instructions were given to the Advocates to take out proceedings for setting aside the exparte order. In the affidavit in support of the motion, the principal contention urged is that the insolvency petition had not been served upon the Judgement debtors as per the requirement of the Presidency Town Insolvency Act. The same ought to have been served upon the Judgment Debtors. It is also contended that the petition itself was not maintainable as the insolvents are not residing at Mumbai for last one year prior to the filing of the insolvency petition and as such the petition as filed was not maintainable being without jurisdiction. It is also contended that the insolvency petition has to be made as early as possible from the date of decree. In the instant case, it was made after inordinate delay of 15 years from the date of passing of the decree and

for that purpose reliance is placed on the judgement in the case of National Small Industries Corporation Ltd. reported in AIR 2000 Calcutta 167.

.In the affidavit-in-reply of Ms. Zenobia Kabadi, in Para 1 it has been specifically set out that by letter dated 11.2.2005, the Judgement Creditors through their advocate's informed the advocates for the insolvents about filing of the petition with a request to waive service. Copies of the petition and the enclosures were also served on the insolvents. As there was no response from the advocates of the Insolvents, the Judgement Creditors applied for postal service and affidavit has been filed in support thereof dated 129.3.2005. That was allowed by this court and accordingly the copies of the petition were sent by registered A.D. at the residential address of the Insolvents both at Thane and Nashik.

. In the rejoinder filed on behalf of the Insolvents by Mr. Sanjay Gupta in Paragraph 14, it is denied that the insolvents have deliberately, intentionally and or otherwise avoided the service of the petition and forced the Petitioning Creditors to serve the same by post. It is also

denied that the insolvents are habitual in avoiding service of the process of the court. It is denied that the Judgement Debtor have been duly served with the petition at Nashik address where they reside. It may be pointed out that based on these averments, it was sought to be contended at the bar by the learned counsel that once affidavit is filed, saying that registered A.D. had not been served on the insolvents, it is on the Judgment Creditor to satisfy the court that proper service has been effected.

6. Can it therefore, be said that there was proper service effected on the insolvents herein. We have already noted Rule 63, which provides for the manner of service of notice in case where the insolvents are not residing within the ordinary limits of the original civil jurisdiction of this court. The language used is that the court may order service to be made within such time and in such manner and form as it shall think fit. The manner of service therefore, is also to be decided by the court. On leave being sought from this court, the court permitted the Judgement Creditors to send copy of the petition by registered post A.D. and under certificate of posting. Pursuant

to that in so far as address at Nashik is concerned in respect of both the insolvents, the postal packet shows that it was intimated on 16th April. There is postal endorsement as "not claimed". Both the envelopes were sent back to the sender as per endorsement dated 25.4.2005. In other words, the notice was forwarded on the insolvents by following proper procedure and by addressing notice at the residential address of the insolvents. Once that be so and the address is not denied, it must be presumed that notice was correctly addressed and in terms of the intimation that intimation was left at the address of the insolvents. As earlier pointed out, it is not the case of the insolvents that between 16.4.2005 and 25.4.2005, that they were not residing at the address being away and consequently had no intimation about the fact. The intimation had been given. In fact there is no specific averment denying that in fact no intimation had been left at the said residential address. The other aspect of the matter as we have noted earlier is that the Judgment creditors had specifically pleaded that notice of the petition was served on the address of the advocates for the insolvents. The insolvents before this court have approached the court on the basis that it is their lawyer who intimated to them about filing of the petition and

order passed. It is impossible for the reasonable man to come to the conclusion that if that be so, the lawyers would not have intimated to the insolvent the fact that Petitioning Creditors had served copy of the petition for the insolvents on them. It can therefore, be safely presumed applying the test again of a reasonable person, that the insolvents were fully aware of the petition being filed and in order to avoid service, had not claimed the postal envelopes containing the petition. A mere denial on the facts of this case,
to my mind is therefore, of no consequence.

. Let us now examine as to whether the Judgement relied upon are of assistance in support of the contention as advanced on behalf of the insolvents herein. In Sunder Spinners (Supra) the court was dealing with the requirements of service of summons. The learned Division Bench held that the service by registered post is at any time a poor substitute for personal service, which is directed by the Code. The Judgement therefore, is clearly distinguishable in as much as in the present case, the mode of service can be regulated by the Court in terms of Rule 63. The court itself directed service by registered post and under certificate of posting. In M.R. Ved (supra) is really of no

assistance in as much as in that case, the court held that where the defendant ran away with the summons that would amount to sufficient service and the non affixation on the buildings on these facts and circumstances would be of no consequence. In The State of Madhya Pradesh (supra) the court observed that endorsement "not available in the house", "House locked" and "shop closed" respectively would indicate respondent therein managed to avoid service and it must be held that notice have been served on the respondents. I am therefore, satisfied that in the present case, the insolvent must have been in the knowledge that insolvency petition had been filed considering that notice and copies of the petition had already been served much earlier on the advocates for insolvents and secondly the Judgement Creditors got the notice served on the Petitioning Creditors after taking leave of this court and notice was correctly addressed at the residential address of the insolvents.

7. Though in this case, it is not necessary to go into the merits of the matter, it may be noted that most contentions as now raised were also raised in the notice of Motion for setting aside the notice and which have been crystalised in Paragraph 3 of

that order. One of the contentions urged, was that the Judgement debtors were neither residing nor carrying on business within the jurisdiction of the court. The court noted that the Judgement Debtors then were also directors of M/s. Tigrania Ispat Private Limited having registered office at 96A, Jolly Chambers, Colaba, Mumbai 400 005 and secondly the Notice taken out is maintainable even though the ground may only be available under Section 11 of the Act when a petition is filed. Non service was also ground which was raised in that motion which was also rejected. In the appeal preferred, contrary to what was sought to be argued on behalf of the insolvents, in so far as decree is concerned and its execution, it was held that principle of constructive res judicata would apply. Paragraph 6 dealt with the issue of the court having no jurisdiction considering that Tigrania Ispat Pvt. Ltd. was carrying on business. The court held that there would be jurisdiction. It may be noted that the Judgement in the motion was pronounced on 23.12.2004 and in the notice of Motion on 2004. The Appellate Bench disposed of the appeal by its order dated 29.3.2005.

. Perhaps the only contention which was left is as can be set out in Paragraph 7 on the ground that

there was inordinate delay in filing the insolvency petition. We may note over here that the Petitioning Creditor is a public financial institution. They had decree in their favour running into crores of rupees. Balancing public interest versus an act of insolvency of the judgement debtors, the insolvency court will have to be lean in favour of the public financial institution.

8. In my opinion, therefore, considering the facts on record this will not be a fit case for this court to exercise its discretion in favour of the insolvents. In the light of that motion stands dismissed.

(F.I. REBELLO,J.)